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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARRY NOEL HOROWITZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Court construe Title 18 §3288 which allows for a second indictment during an additional six-month period beyond the statute of limitations when the first indictment had been dismissed too broadly?

BARRY NOEL HOROWITZ petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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OPINION BELOW

On April 2, 1985, the Court of Appeals entered its panel opinion, for publication, affirming the conviction of Petitioner for subscribing to a false income tax return in violation of Title 26 U.S.C. §7206(1). A copy of the panel opinion is reproduced as Appendix "A" hereof. No Petition for Rehearing or Suggestion for Rehearing En Banc was filed.

Petitioner is presently at liberty, having been placed on probation at the time that the original sentence was imposed.

JURISDICTION

Jurisdiction was initiated by criminal indictment of a federal grand jury, and jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18 U.S.C. §3288 provides, as follows:

"Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in Open Court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period proscribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six (6) calendar months of the date of the dismissal of the indict-

ment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six (6) calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations."

STATEMENT OF THE CASE

Two indictments underlie the factual recitation of the instant case. The first indictment was brought on April 7, 1982, a period some eight (8) days short of the six (6) year statute of limitations applicable to the income tax violations. Based upon hearings which occurred before the United States Magistrate in reference to the first indictment and his findings that the Government failed to present exculpatory evidence when they had promised to do so, the first indictment was recommended for dismissal by the Magistrate on June 9, 1982. Procedures in the District Court in Nevada allow for the Government to file objections to recommendations of the United States Magistrate. The Government however in the instant case filed no objections to the Magistrate's findings and as a result, the District Court entered its order on June 17, 1982 granting the Defendant's motion to dismiss for failure to present exculpatory evidence. The Government further took no appeal from the order granting the motion. Instead, on October 14, 1982, nearly four months after the District Court's order of dismissal, a second and identical indictment was returned against Mr. HOROWITZ. Obviously, had the original indictment been brought on October 14, 1982, this would have been beyond the period of the statute of limitations.

After the filing of the second indictment, counsel for Defendant HOROWITZ moved to dismiss on the grounds that the second indictment was barred by the statute of limitations and further that Title 18 U.S.C. §3288 was not of assistance to the Government as a tolling provision for the statute of limitations since the error was brought upon the record by the actions of the Government itself. The United States Magistrate who presided over the hearing on the motion to dismiss the indictment as being beyond the statute of limitations was the same United States Magistrate who had originally dismissed the first indictment. At the hearings which occurred on the motion to dismiss as beyond the statute of limitations, it was pointed out that the previous indictment had been dismissed because the Government had failed, after promising to do so, to allow the Defendant to present exculpatory evidence to the grand jury. It was further pointed out that at the original hearing on the motion to dismiss for failure to present exculpatory evidence, that the Government had called as a witness the prosecutor who had originally been responsible for the case and who testified that he had specifically advised the second prosecutor who ultimately indicted the Horowitz case of the promise made to counsel for Defendant HOROWITZ to be allowed to present exculpatory evidence before the grand jury. The Magistrate had even found as part of his findings of facts that there was also a letter from Mr. HOROWITZ's attorney whom the first prosecutor promised would be read to the grand jury and that the second prosecutor was told this but that the second prosecutor had failed to bring this to the attention of a grand jury.

Although the United States Magistrate considered the Defendant's motion to dismiss the indictment as being outside of the statute of limitations and further considered the

issue of the fact that the indictment was dismissed because there had been a failure to present exculpatory evidence, the Magistrate based his opinion to deny the motion to dismiss upon *United States v. Charnay,* 537 F.2d 341 (9th Cir., 1976) which had broadly construed Title 18 U.S.C. §3288 to, in effect, allow for an additional period of six (6) months to indict, after the dismissal of the first indictment and even though it was beyond the period of the original statute of limitations.

The matter was thereafter appealed to the Ninth Circuit Court of Appeals and the argument was again made that the District Court had erred in not dismissing the second indictment as outside of the statute of limitations. The Ninth Circuit Court of Appeals interpreted the issue as being ". . . whether an indictment may be refiled within six months after the expiration of the statute of limitations under 18 U.S.C. §3288 (1982) where the earlier accusatory pleading was dismissed for a non-intentional failure to present exculpatory evidence to the grand jury . . .". It is suggested herein that the question of whether or not there was an intentional versus a non-intentional failure was not presented to the Ninth Circuit but only the question of based upon the District Court's finding based on *Charnay, supra* whether or not Section 3288 has any parameters or, alternatively, whether it allows an indictment at all times. The Appellate Court went on to find that Section 3288 covered a defect in the proceedings before the grand jury such as the non-intentional failure to present exculpatory evidence. Again, the finding of the United States Magistrate was based upon the prior ruling of the Ninth Circuit in *Charnay, supra.* The Appellate Court, in fact, went on to find that it was not necessary for the Court to reach the Defendant's contention that Section 3288 did not apply to intentional prosecutorial misconduct

because the issue was not before them on appeal. It is respectfully suggested that the question of non-intentional failure to present exculpatory evidence was also not the *per se* issue on appeal. Unlike the *Charnay* case, *supra*, the Ninth Circuit found in footnote 3 of their opinion that ". . . there may be instances when intentional prosecutorial misconduct effects the Appellant's right to a fair trial guaranteed by the Due Process Clause of the Fifth Amendment. As noted above, there is no evidence of intentional prosecutorial misconduct in the instant case. We, therefore, do not here determine whether the phrase "for any cause" nevertheless implicitly bars reindictment whenever the original indictment was dismissed for such conduct".

A reading of the Appellate Court's decision, however, demonstrates that its decision was neither based upon intentional nor unintentional acts of the prosecutor but again upon a narrow reading of Title 18 U.S.C. §3288.

REASON FOR GRANTING THE WRIT

The initial holding of the Appellate Court was that Title 18 U.S.C. §3288 was a question of statutory interpretation and therefore subject to *de novo* review. *See Dumdeang v. CIR*, 739 F.2d 452, 453 (9th Cir., 1984). It is suggested that since a Federal Statute is involved, that this Honorable Court is respectfully called upon to interpret that Federal Statute. An additional reason exists for this Honorable Court to grant the instant Petition since a conflict appears between the Circuits on the interpretation of Section 3288. The Ninth Circuit through *United States v. Charnay, supra*, and through the instant case have given a broad interpretation to Section 3288. In *United States v. Grady*, 544 F.2d 598 (2nd Cir.,

1976), the Court considered the effect of this same Section and found, in part, as follows:

> "The six month extension of time after the dismissal of an indictment as provided by 18 U.S.C. §3288 is available only if the dismissal is for technical defects or irregularity in the grand jury . . .".

The Second Circuit cited *United States v. Distefano,* 347 F.Supp. 422, 444-445 (S.D.N.Y., 1972) and *United States v. Moriarty,* 327 F.Supp. 1045 (E.D. Wisc., 1971). *Distefano, supra* was a proceeding on a Government's motion to reenstate an indictment which had been dismissed after the failure of the prosecution to prosecute the case. The District Court held that after the statute of limitations covering the offense charged in the indictment had run, the Federal District Court was without power to reenstate the indictment. The facts in *Distefano, supra* involved a situation where the Government was ultimately required to inform the Court that it was unsuccessful in locating certain essential witnesses for the trial. Eventually, because of the Government's inability to proceed, the Court granted the defendant's motion to dismiss the indictment for failure to prosecute. Shortly after this, the statute of limitations ran. Ultimately, the Government found the witness that had been missing and moved to reenstate the indictment but the District Court denied the motion to reenstate the indictment, finding that the statute of limitations had run and that the Court was without the power to reenstate the indictment. In referring to Section 3288, the Court acknowledged that when an indictment is dismissed because of technical defects or irregularity in the grand jury, a new indictment might be returned within six (6) months of the date of dismissal, even though the statute of limitations has run. The Court further found, however, ". . . where the indictment has been dismissed for failure to prosecute, reindict-

ment is not possible once the statute of limitations has expired." In *United States v. Moriarty, supra,* tax evasion cases were considered by the Court and the Court held that where the Government's sole grounds for its motion to dismiss an indictment had been that the interests of justice demanded no further prosecution, a reindictment was not permissible under the statute allowing the indictment only after dismissal of an indictment for error, defect or irregularity with respect to the grand jury. The *Moriarty* Court further held that the statute of limitations is to be construed liberally in favor of a criminal defendant. The Court specifically held that Section 3288 allowed for reindictment only after the dismissal of an indictment for error, defect or irregularity with respect to the grand jury.

CONCLUSION

It is respectfully requested that this Honorable Court grant the instant Petition for a Writ of Certiorari in light of the statutory construction given by the Appellate Court to Section 3288 and further because a conflict appears to exist between the Circuits.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

It is hereby certified that three true and correct copies of the foregoing Petition for Writ of Certiorari were delivered that _____ day of _____, 1985, to the United States Solicitor General, United States Department of Justice, Washington, D.C. 20530.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) No. 84-1214
	) D.C. No.
vs.	) CR LV-82-212-1-RDF
BARRY NOEL HOROWITZ, Defendant-Appellant.	) OPINION

Appeal from the United States District Court
for the District of Nevada, Las Vegas
Roger D. Foley, District Judge, Presiding
Argued and submitted February 12, 1985

Before: KENNEDY, ALARCON, and NELSON, Circuit Judges.
ALARCON, Circuit Judge:

Barry Noel Horowitz (hereinafter Horowitz) appeals from the judgment entered following his conviction for subscribing to a false income tax return in violation of 26 U.S.C. §7206(1) (1982).

We must decide whether an indictment may be refiled within six months after the expiration of the statute of limitations under 18 U.S.C. §3288 (1982) where the earlier

accusatory pleading was dismissed for a nonintentional failure to present exculpatory evidence to the grand jury. We have concluded that section 3288 covers a defect in the proceedings before the grand jury such as the nonintentional failure to present exculpatory evidence. We do not reach Horowitz's contention that section 3288 does not apply to intentional prosecutorial misconduct because that issue is not before us on this record.

I
ISSUES ON APPEAL

Horowitz raises the following issues on appeal:

One. The district court erred in failing to dismiss the second indictment as outside the statute of limitations.

Two. The district court erred in refusing to dismiss this matter because of preindictment delay.

Three. The district court erred in denying his motion for a new trial because the jury returned inconsistent verdicts.

Four. This court must reverse because of the insufficiency of the evidence.

II
PERTINENT FACTS

Appellant Horowitz operated a business known as Cactus Mountain Cleaners (hereinafter Cactus Mountain) in Las Vegas, Nevada. Cactus Mountain was a janitorial service specializing in kitchen clean-up for hotels in the Las Vegas area.

An audit was conducted by the Internal Revenue Service (hereinafter the IRS) as a result of discrepancies between the gross income reported on Cactus Mountain's 1975 corporate tax return, its gross receipts, and the amount of income reported by Horowitz on his 1975 individual return. The audit disclosed a total of $36,590 of unreported income for the 1975 tax year. This unreported income resulted from the cashing of eight checks from the Stardust Hotel, and two checks from the Hacienda Hotel which were not reflected on Cactus Mountain's corporate return or on Horowitz's personal return.

Horowitz was charged with subscribing to a false income tax return in violation of 26 U.S.C. §7206(1) (Count I), and with aiding and abetting in the preparation and presentation of a false and fraudulent return in violation of 26 U.S.C. §7206(2) (Count II), in an indictment returned by a federal grand jury on April 17, 1982.[1] This indictment was dismissed prior to trial on Horowitz's motion, however, because the court found that the government failed to present exculpatory evidence to the grand jury. A second indictment, identical to the April 7 indictment, was returned on October 14, 1982. Because the applicable statute of limitations had in fact expired on April 15, 1982, the second indictment was filed pursuant to 18 U.S.C. §3288.

Horowitz immediately filed a number of pretrial motions, including a motion to dismiss because the indictment was outside the statute of limitations and a motion to dismiss due to preindictment delay. Both motions were denied. The jury found Horowitz guilty of subscribing to a false income tax

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[1]Count I alleged acts pertaining to Horowitz's 1975 personal income tax return, while Count II alleged acts pertaining to Cactus Mountain's 1975 corporate tax return.

return, but acquitted him of aiding and abetting in the preparation and presentation of a false and fraudulent return. Horowitz's post trial motion for the entry of a judgment of acquittal was denied.

III
DISCUSSION

A. Application of Section 3288 to a Nonintentional Failure to Present Exculpatory Evidence

Horowitz argues that the second indictment should have been dismissed because section 3288's savings clause was never intended to apply to indictments which were dismissed for legal defects. He contends that section 3288 only applies to indictments which were dismissed because of technical irregularities concerning the grand jury. We disagree.

Statutory interpretation is a question of law and therefore subject to de novo review. *Dumdeang v. C.I.R.*, 739 F.2d 452, 453 (9th Cir. 1984).

Section 3288 provides:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, *or an indictment* or information filed after the defendant waives in open court prosecution by indictment *is found otherwise defective or insufficient for any cause,* after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new

> indictment shall not be barred by any statute of limitations.

18 U.S.C. §3288 (1982) (emphasis added).

While the first clause of section 3288 appears to be aimed at dismissals resulting from technical irregularities concerning the grand jury, the second clause is much more general. It expressly brings indictments dismissed *for any cause* within the scope of section 3288's savings clause. The legislative history of section 3288 supports this broad interpretation of the statute. "The sections [sections 3288 and 3289] concern cases where a new indictment is returned after a prior indictment has been dismissed, because of an error, defect, or irregularity with respect to the grand jury, *or because it has been found otherwise defective.*" S. Rep. No. 1414, 88th Cong., 2d Sess. 1 (1964), *Reprinted in* 1964 U.S. Code Cong. & Ad. News 3257, 3258 (emphasis added).

Contrary to Horowitz's contention, the phrase "for any cause" does not bar reindictment when the original indictment was dismissed for a *legal* defect or defects. In *United States v. Charnay*, 537 F.2d 341 (9th Cir.), *cert. denied*, 429 U.S. 1000 (1976), we held that the statutory provision for reindictment after dismissals "for any cause" allows reindictment after dismissal due to legal defects in the original indictment. "[A] second indictment may properly be returned within the prescribed six-month period where the dismissal of the first indictment is due to a legal defect, as well as in those cases where the dismissal results from defects or irregularities in the grand jury." *Id.* at 355. This interpretation is in keeping with the purpose of the statute, which is "to prevent the escape of those who had been seasonably indicted, but whose indictment was bad because of some corrigible mistake." *Id.* (*citing United States v. Strewl*, 99 F.2d 474 (2d Cir. 1938), *cert. denied*, 306 U.S. 638 (1939). *See also*

United States v. Macklin, 535 F.2d 191, 193 (2d Cir. 1976) ("§3288 was meant to apply whenever the first charging paper was vacated for any reason whatever"). We believe *Charnay* was correctly decided and is fully applicable under these facts.

Horowitz argues that section 3288 should not be applied where the first indictment has been dismissed for intentional prosecutorial misconduct. We cannot decide this question because there is no evidence of intentional prosecutorial misconduct in the record.

It is undisputed that the Assistant United States Attorney (hereinafter AUSA) who originally handled the case promised Horowitz's counsel that certain allegedly exculpatory medical evidence would be presented to the grand jury. Shortly thereafter, the case was reassigned to a second AUSA, who was informed of the agreement concerning the aforementioned medical evidence. When the case was presented to the grand jury, the prosecutor did not present all of the exculpatory evidence in the agreement between the first AUSA and Horowitz's attorney.

The magistrate expressly found that although the prosecutor failed to present all of the exculpatory evidence to the grand jury as agreed, this failure "was neither flagrant conduct in the sense of its being malicious," nor "intentionally designed to deceive the grand jury's ability to exercise independent judgement."[2] He also expressly found that the prosecutor's conduct was negligent and not intentional. The magistrate concluded that the prosecutor's conduct was "corrigible" but fell short of prosecutorial "misconduct."

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[2]While the evidence was not presented in the format, style, or quantity agreed upon, our review of the record discloses that some evidence of Horowitz's medical condition was presented to the grand jury.

These findings and conclusions were reviewed and then adopted by the district court judge in dismissing the first indictment.

The finding that the prosecutor's failure to present exculpatory evidence to the grand jury was negligent but neither malicious nor intention is factual, and cannot be disturbed unless clearly erroneous. *See United States v. McConney,* 728 F.2d 1195, 1200 (9th Cir.) (en banc), *cert. denied,* ____ U.S. ____, 105 S.Ct. 101 (1984); *Bohemia, Inc. v. Home Ins. Co.,* 725 F.2d 506, 508-09 (9th Cir. 1984). No evidence was offered by Horowitz to prove that the prosecutor acted intentionally. The record supports the court's finding that the second prosecutor did not intentionally fail to present all exculpatory evidence to the grand jury.

Horowitz also asserts that the failure of the prosecutor to present exculpatory evidence is an abuse of the grand jury system which compels a per se reversal, a dismissal of the indictment, and is a bar to further prosecution.

Although this court has held that "the '[d]ismissal of an indictment is required . . . in flagrant cases in which the grand jury has been overreached in some significant way.' " *United States v. Cederquist,* 641 F.2d 1347, 1352-53 (9th Cir. 1981), *quoting United States v. Thompson,* 576 F.2d 784, 786 (9th Cir. 1978), the failure of the prosecution to bring forth evidence favorable to the defendant does not present a basis to dismiss an indictment. *Cederquist,* 641 F.2d at 1353, n.3. *See also United States v. Trass,* 644 F.2d 791, 797 (9th Cir. 1981) ("[A]n indictment will not be dismissed simply because the prosecutor does not present the grand jury all available exculpatory information, or all material bearing upon the credibility of potential witnesses.").

The district court did not err in denying Horowitz's motion to dismiss on the ground that the second indictment was

returned after the statute of limitations had expired. The second prosecutor's nonintentional failure to present all the exculpatory evidence as agreed was a corrigible defect or irregularity covered by the provisions of section 3288.[3]

B. Preindictment Delay - Necessity For Showing Of Prejudice

Horowitz also contends that the district court erred in finding that he had not been prejudiced by excessive preindictment delay. He argues that the absence of Lisa, a witness whose testimony was allegedly material to his defense, was caused by the delay. He also argues that he was prejudiced because the memories of his other witnesses had dimmed as to certain material facts and events due to the extended passage of time between the events in issue and his indictment.

Excessive preindictment delay can result in the denial of due process of law which is guaranteed by the Fifth Amendment. *United States v. Marion,* 404 U.S. 307, 325-26 (1971); *United States v. Swacker,* 628 F.2d 1250, 1251 (9th Cir. 1980). In considering whether an excessive delay requires the dismissal of an indictment, a court must first

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[3]We recognize that there may be instances when intentional prosecutorial misconduct affects the appellant's right to a fair trial guaranteed by the due process clause of the Fifth Amendment. As noted above, there is no evidence of intentional prosecutorial misconduct in the instant case. We therefore do not here determine whether the phrase "for any cause" nevertheless implicitly bars reindictment whenever the original indictment was dismissed for such misconduct.

We note that this issue has been addressed at the district court level. *See United States v. Serubo,* 502 F.Supp. 288 (E.D. Pa. 1980) (holding that dismissal of an indictment because of prosecutorial misconduct does not bar timely reindictment pursuant to 18 U.S.C. §3288).

determine whether the defendant suffered actual prejudice because of the delay. *United States v. Carruth,* 699 F.2d 1017, 1019 (9th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 698 (1984). While the length of the delay and the reason for the delay are factors to be balanced by the court, a finding of actual prejudice is a prerequisite to finding a due process violation. *Cederquist,* 641 F.2d at 1351; *United States v. Titus,* 576 F.2d 210, 211 (9th Cir.), *cert. denied,* 439 U.S. 860 (1978).

The burden of presenting proof of actual prejudice is on the defendant. *Carruth,* 699 F.2d at 1019. To establish actual prejudice due to the inability to locate a witness sufficient to warrant dismissal of an indictment, a defendant must not only establish his inability to locate the witness, but also must demonstrate that the loss of this witness and his or her expected testimony has prejudiced him. *United States v. Mays,* 549 F.2d 670, 677 (9th Cir. 1977). Such proof must be definite and not speculative. *Carruth,* 699 F.2d at 1019. This means that the defendant must actually show that the loss of the witness has impaired his ability to defend himself meaningfully. *Cederquist,* 641 F.2d at 1351.

The record shows that Horowitz testified that he could not have "willingly" participated in the acts charged since he was heavily drugged and sedated at the time of the alleged violations as a result of suffering serious injuries in an auto accident. He argues that since Lisa took care of him from February 1, 1976, through June 30, 1976, while he was recuperating, she would have been the witness best able to testify to the effect of the medication on his conduct and memory. Although Lisa may have been the best source of the evidence concerning his mental and physical condition at the time these violations occurred, she was not the sole source of this information. Indeed, the record reveals a substantial

amount of testimony covering the same facts which could have been related by the missing witness. Nearly every defense witness described Horowitz's mental and physical condition to the jury. One witness also testified that he had had almost daily contact with Horowitz during the period in question. Evidence was presented concerning the type and quantity of medication taken by the appellant. It is clear that rather than being unique, Lisa's testimony would have been cumulative of the testimony presented through other defense witnesses. Thus, Horowitz has failed to demonstrate the loss of any evidence due to preindictment delay.

Horowitz's claim of actual prejudice due to the dimming of memories is likewise unsupported by the record. To establish actual prejudice on these grounds, the defendant must prove that the witnesses' memories were impaired by the passage of time. *See Mays,* 549 F.2d at 677. There is no evidence of memory loss on the part of any defense witness in the instant case. In fact, the record is replete with examples of their ability to remember key incidents and transactions. The testimony of each witness was clear, lucid and detailed.

Mere assertions that the testimony of a missing witness might have been useful, or that witnesses' memories may have faded with the passage of time is not "proof of actual prejudice" required by *United States v. Marion. Mays,* 549 F.2d at 677 & n.2. Since the required showing of actual prejudice is lacking, it is unnecessary for us to consider the length of, or the reasons for, the delay. *Titus,* 576 F.2d at 212. The motion to dismiss based on preindictment delay was properly denied.

C. Inconsistent Verdicts

Appellant's contention that the district court erred by refusing to grant his motion for judgment of acquittal or, alter-

natively, in not reversing the finding of guilt, on the grounds of inconsistent jury verdicts, is equally lacking in merit. Inconsistent jury verdicts do not mandate reversal for it has long been the rule that consistency between verdicts is not required. *See United States v. Powell,* ____ U.S. ____, 105 S.Ct. 471, 473 (1984), (*citing Dunn v. United States,* 284 U.S. 390 (1932)). A defendant can be convicted upon one or some of the counts but acquitted on another or others and the conviction will be sustained even though rationally incompatible with the acquittal. *United States v. Miller,* 546 F.2d 320, 325 (9th Cir. 1976); *United States v. Livengood,* 427 F.2d 420, 423 (9th Cir. 1970). The motion for judgment of acquittal was properly denied.

D. Sufficiency of the Evidence

Horowitz's final contention is that there was insufficient evidence to support his conviction for subscribing a false individual tax return. In reviewing a claim of insufficient evidence, we must view the evidence and the inferences therefrom in the light most favorable to the government, and decide whether any rational jury could have found the essential elements of the crime charged beyond a reasonable doubt. *United States v. Gomez-Soto,* 723 F.2d 649, 655 (9th Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 2360 (1984); *Swacker,* 628 F.2d at 1254-55. We have gone over the entire record and conclude that there was sufficient relevant evidence to support Horowitz's conviction for subscribing a false individual tax return.

There was ample evidence tending to prove that Horowitz willfully made and subscribed an individual income tax return that was false as to a material element, and that he did not believe such return was true and correct as to every material element. For example, there was evidence that the

1975 individual return was personally signed by Horowitz. Further, Horowitz acknowledged that certain income had been unreported. There was also evidence that $30,025 had not been reported on Horowitz's 1974 income tax return. All of this information was evidence from which the jury could have concluded that Horowitz was guilty of Count I.

Horowitz correctly asserts that there was evidence that he was ill and often heavily sedated at the time the events at issue occurred. It is the exclusive function of the jury to weigh the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences from the established facts. *United States v. Ramirez-Rodriguez,* 552 F.2d 883, 884 (9th Cir. 1977) (per curiam). The evidence was sufficient to convince a rational jury that Horowitz was guilty of subscribing a false individual tax return. The jury was free to disbelieve evidence to the contrary. Horowitz has failed to demonstrate that the jury ignored his defense.

IV
CONCLUSION

We conclude that section 3288 does not bar reindictment after the passage of the statute of limitations when the original indictment is dismissed for a legal defect such as the nonintentional failure to present exculpatory evidence to the grand jury. Since the second indictment was obtained within the six month statutory period, it was both timely and proper. Further, the district court did not err by refusing to dismiss the indictment on the grounds of excessive preindictment delay. Horowitz failed to prove that he was actually prejudiced by the preindictment delay. In the absence of proof of

actual prejudice, preindictment delay cannot successfully support a motion to dismiss an indictment.

In addition, contrary to appellant's assertions, consistency between verdicts of a multi-count indictment is not required. The district court thus did not err by refusing to grant appellant's motion for judgment of acquittal because of allegedly inconsistent jury verdicts. Finally, there was sufficient evidence from which a rational jury could have reasonably found Horowitz guilty of subscribing to a false income tax return.

Accordingly, the judgment of the district court is AFFIRMED.